No. _____

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1997

VICKY M. LOPEZ, CRESCENCIO PADILLA, WILLIAM A. MELENDEZ, and DAVID SERENA, *Appellants*,

v.

MONTEREY COUNTY, CALIFORNIA, STATE OF CALIFORNIA, *Appellees*,

and

WENDY DUFFY, *Intervenor-Appellee*

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA

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QUESTION PRESENTED

WHETHER A SECTION 5-COVERED JURISDICTION MAY IMPLEMENT VOTING CHANGES WITHOUT PRECLEARANCE–WHEN THE CHANGES WERE INITIALLY CREATED BY COUNTY ORDINANCES THAT THIS COURT ALREADY HAS DETERMINED TO BE SUBJECT TO SECTION 5–SIMPLY BECAUSE THE STATE, AN UNCOVERED JURISDICTION, SUBSEQUENTLY ENACTS LEGISLATION THAT INCORPORATES THE COUNTY'S PRIOR CHANGES.

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Jurisdictional Statement

This Court has jurisdiction pursuant to 28 U.S.C. §§ 1253, 1291, and 42 U.S.C. § 1973c to review the Order Granting (1) Motion to Dismiss First Amended Complaint; and (2) Motion to Vacate Order Extending Judicial Terms filed by the United States District Court for the Northern District of California on December 19, 1997, and to review the Judgment of Dismissal entered by the District Court on December 22, 1997. The notice of appeal was filed on December 24, 1997, within the thirty-day time period specified by 28 U.S.C. § 2101(b).

Appellants' Jurisdictional Statement Appendix 13 (hereinafter cited as J.S. App., filed herewith under separate cover).

Opinion Below

The Order Granting (1) Motion to Dismiss First Amended Complaint; and (2) Motion to Vacate Order Extending Judicial Terms filed on December 19, 1997 is not yet reported and is reprinted in full in the Appendix. J.S. App. 1. The Judgment of Dismissal entered by the District Court on December 22, 1997, is also not reported and is reprinted in full in the Appendix. J.S. App. 11.

Relevant Statutes and Regulations

42 U.S.C. § 1973c. The statute is reproduced in the Appendix (J.S. App. 16).

Statement of the Case

Monterey County, California ("County") is subject to the § 5 preclearance provisions of the Voting Rights Act. Accordingly, the County must secure an administrative ruling from the United States Attorney General or a declaratory judgment from the District Court for the District of Columbia that a covered voting change enacted after November 1, 1968, does not have the purpose or the effect of denying or abridging the right to vote on account of race, color, or membership in a language minority group. 42 U.S.C. § 1973c; *Lopez v. Monterey County,* 117 S.Ct. 340, 343 (1996).

Despite this statutory mandate, the lower court ruled that a change in the County's voting practice—dependent upon ordinances already held by this Court to be subject to § 5—is exempt from preclearance requirements. Its holding relied upon the premise that subsequently-enacted state statutes, which incorporated the County's ordinances, did not have to be precleared and obviated the need for preclearance of the ordinances. The lower court reasoned that because the State

is not a § 5-covered jurisdiction, the County's voting change is now immunized from § 5 strictures.

The ruling is inconsistent with this Court's § 5 precedents and would undo decades of § 5 administrative practice involving partially covered states. If § 5 is to maintain its intended deterrent effect, it cannot be rendered meaningless simply because a county's otherwise covered voting change is incorporated into a statute enacted by an uncovered state.

Historical Background

The County had two municipal court and seven justice court districts on November 1, 1968. The courts were trial courts with limited jurisdiction.[1] The judges within each of the judicial districts were elected within the respective judicial district. Between November 1, 1968, and 1983, the County adopted a series of ordinances which ultimately consolidated the judicial districts into a single county-wide municipal court district.[2] *Lopez,* 117 S.Ct. at 344. County-wide judicial elections were conducted in 1986, 1988, and 1990. Presently, there are ten judgeships on the municipal court. In addition to the County's judicial district consolidation ordinances, this Court noted that the State of California had enacted laws which "have reflected changes in the County's judicial districts resulting from the consolidation process."[3] *Lopez,* 117 S.Ct. at 343-344. For

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[1] Justice court districts were eliminated as a result of a constitutional amendment adopted by the California electorate in 1995. J.S. App. 8, Order at 5.

[2] The First Amended Complaint provides a detailed chronology of the judicial district consolidation ordinances enacted by Monterey County. J.S. App. 83.

[3] This Court listed these statutes in its prior opinion. One of the statutes listed was 1979 Cal. Stats. ch. 694, § 2, which was the statute utilized by the District Court to dismiss

example, 1979 Cal. Stats., ch. 694, § 2, consolidated the North Monterey County Judicial District into a single municipal court district. J.S. App. 32. The North Monterey County Judicial District was listed as a municipal court district in 1977 Cal. Stats. ch. 995, § 1. J.S. App. 30. However, the two statutes did not define the North Monterey County Judicial District. Such a district was defined by Monterey County Ordinance No. 2195, adopted by the Monterey County Board of Supervisors on August 10, 1976. J.S. App. 65.

None of the judicial district consolidation ordinances was submitted by the County for § 5 approval. In 1983, the State submitted for § 5 preclearance a statute which mentioned one such ordinance, providing for "Monterey County's prospective consolidation of the last two justice court districts with the remaining municipal court district." 1983 Cal. Stats. ch. 1249. *Lopez*, 117 S.Ct. at 344. This County ordinance was Ordinance No. 2930, which the State submitted for § 5 approval. The District Court held that Ordinance No. 2930 had received the requisite § 5 approval. J.S. App. 7, Order at 6. Although Ordinance No. 2930 may have been precleared, this Court observed that none of the prior judicial district consolidation ordinances has ever been submitted for § 5 approval. Thus, "[u]nder our precedent, these previous consolidation ordinances do not appear to have received federal preclearance approval." *Lopez*, 117 S.Ct. at 345.

Prior Proceedings

Appellants, who are Latino voters of Monterey County, filed this action on September 6, 1991. The case seeks injunctive relief against the implementation of the voting changes reflected in the County's judicial district consolidation ordinances because the ordinances have not received the requisite § 5 approval. The three-judge court initially held that

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the present § 5 enforcement action. *Lopez*, 117 S.Ct. at 344, footnote "*".

the County's ordinances were subject to § 5 preclearance requirements but had not received § 5 approval. Subsequently, the County sought judicial preclearance from the District Court for the District of Columbia. *Monterey County v. United States*, Civ. Act. No. 93-1639 (D.D.C. filed August 10, 1993). The action was voluntarily dismissed after the County acknowledged that it was not able to demonstrate, as required by § 5, that several of the ordinances did not have a retrogressive effect on Latino voting strength. *Lopez*, 117 S.Ct. at 345.

Thereafter, Appellants and the County submitted to the District Court for the Northern District of California proposed election plans for the court's approval. These election plans were opposed by the State and other intervenors on the basis that the plans violated certain constitutional provisions. The District Court enjoined the 1994 judicial elections and requested all the parties "to develop a workable solution." *Lopez*, 117 S.Ct. at 346. The parties were unable to resolve their differences. Subsequently, in a December 20, 1994 Order, the District Court ordered the County to implement a previously submitted division election plan in a special judicial election to be held on June 6, 1995. Under the division plan, there continued to be a single county-wide municipal court. However, judges would be elected from four divisions or election districts. The County's election district plan received § 5 approval from the Attorney General on March 6, 1995. *Lopez*, 117 S.Ct. at 346. Seven judges, with terms expiring in January 1997, were elected in the June 6, 1995 elections.

On November 1, 1995, the District Court changed course and, deciding that the interim election plan's constitutionality was in doubt, issued an Order reverting to a county-wide election to be held on March 26, 1996. As summarized by this Court, "[t]hus, in essence, four years after the filing of the complaint in this case, the District Court ordered the County to hold elections under the very same scheme that appellants originally challenged under § 5 as unprecleared." *Lopez*, 117 S.Ct. at 346. On February 1, 1996, this Court granted a stay of

the November 1, 1995, order and noted probable jurisdiction on April 1, 1996. *Ibid.*

This Court held that the District Court committed legal error by implementing an election plan which reflected the County's policy choice of conducting county-wide judicial elections, when the county-wide election plan had not received the required § 5 preclearance. This Court expressly directed the County to comply with the preclearance requirements: "The requirement of federal scrutiny should be satisfied without further delay." 117 S.Ct. at 349.

On remand, the State filed a motion to dismiss Appellants' First Amended Complaint and a motion to vacate the order extending judicial terms.[4] The State's motion to dismiss was based on several grounds which were expressly reserved by this Court for consideration on remand.[5] On December 19, 1997, the District Court dismissed the First Amended Complaint and denied a stay of its Order. J.S. App. 1, Order at 8. The

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[4] Following this Court's February 1996 stay order, the District Court extended the judicial terms of those judges whose terms would have expired in January 1997. J.S. App. 2, Order at 1.

[5] The District Court summarized these grounds into four categories: 1) intervening changes in state laws have superseded the county ordinances and thus the county-wide judicial election system had been converted into an election system mandated by state law rather than by county ordinances; 2) "the complaint is barred by laches"; 3) the Voting Rights Act was unconstitutionally applied when Monterey County was designated a jurisdiction subject to the § 5 preclearance provisions; and, 4) the county ordinances did not constitute voting changes subject to § 5 approval. The District Court did not address categories 2 through 4, finding that the first ground was dispositive in the dismissal of the Appellants' First Amended Complaint. J.S. App. 1, Order at 3.

judgment of dismissal was entered on December 22, 1997. J.S. App. 11. Notice of Appeal of the District Court's Order was filed on December 24, 1997. J.S. App. 13. On January 23, 1998, this court granted a stay of the December 22, 1997, Order dismissing this action.

District Court's Order

The dismissal of the First Amended Complaint was premised upon the District Court's finding that 1979 Cal. Stats. chap. 694, previously codified in Cal. Gov. Code § 73560, consolidated three municipal courts into a single municipal court district for Monterey County.[6] The District Court held that the establishment of this single municipal court district was not subject to § 5 review because the State of California is not a designated jurisdiction subject to the § 5 preclearance requirements. According to the District Court's interpretation of § 5, the opening clause refers only to those political jurisdictions which have been specifically designated pursuant to § 4(b) of the Voting Rights Act: "[t]he plain language of the clause does not apply to an uncovered state which 'enact(s) or seek(s) to administer' a voting plan in a subordinate, covered county." J.S. App. 5, Order at 4. Since the State of California was not designated pursuant to § 4(b), the District Court reasoned, state statutes mandating the implementation of voting changes in a § 5-covered county are not subject to § 5.

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[6] The 1979 statute amended Cal. Gov. Code 73560 as follows: "There is in the county of Monterey, on and after the effective date of this section, a single municipal court district which embraces the former Salinas Judicial District, Monterey Peninsula Judicial District and North Monterey County Judicial District. This article applies to the municipal court established within the judicial district which shall be known as the Monterey County Municipal Court." J.S. App. 32.

I. Argument — The Question Presented Is Substantial

The principal issue before this Court is whether an admitted change in voting practice in a § 5-covered county is exempt from preclearance requirements simply because the legislative source for the change is a state statute. If, as Appellants submit, the County's administration and implementation of the state statutes are subject to § 5 preclearance requirements, this Court need not reach the subsidiary question of whether the County is additionally required to obtain preclearance of the antecedent County ordinances.

In accepting the State's argument that its legislation protects Monterey County from § 5's reach, the District Court carves out an unwarranted exception to § 5 preclearance requirements. In its opinion in the initial appeal of this case, this Court did not reach the question of whether state statutes have the prophylactic effect urged by the State, but it did determine a key issue on this appeal, *i.e.*, that the County ordinances enacted prior to 1983 did not receive the federal preclearance approval required by this Court's precedent. *Lopez*, 117 S.Ct. at 345. In reversing the lower court's order authorizing an election plan that had not been precleared pursuant to § 5 of the Voting Rights Act, this Court concluded its opinion by admonishing the County to satisfy its obligation to submit its voting changes to federal scrutiny "without further delay." *Id.* at 349. On remand, the lower court erroneously assumed that the subsequently enacted state statute incorporating the changes initially created by the County ordinances cured the illegal effect of the County's failure to fulfill its preclearance obligations. The lower court's ruling, permitting covered jurisdictions to evade § 5's preclearance requirements by seeking enactment of state statutes reflecting the unprecleared changes, raises a substantial question regarding effective enforcement of the Voting Rights Act, and should be summarily reversed.

A. The District Court Erred In Concluding that § 5 Does Not Apply To a State Statute that Effects a Voting Change in a § 5-Covered County

Relevant precedent, the plain reading of § 5, the legislative history accompanying the 1982 Voting Rights Act extension, and the administrative practices of the United States Attorney General all demonstrate that the District Court's order to dismiss the First Amended Complaint was erroneous.

1. Applicable Precedent Requires Preclearance for State Statutes Effecting Voting Changes in § 5-Covered Political Subdivisions.

The lower court's construction of § 5 is flatly inconsistent with prior decisions of this Court. Under the lower court's reasoning, for example, *Perkins v. Matthews*, 400 U.S. 379 (1971), would have been decided differently. In *Perkins*, the county's change to at-large elections was mandated by state law and therefore, the county argued, "it had no choice but to comply with the [state] statute." *Id.* at 394. This Court rejected that argument: "We have concluded, nevertheless, that the change to at-large elections required federal scrutiny under § 5." *Ibid.*

This rationale was reiterated in the more recent case *Foreman v. Dallas County*, 117 S.Ct. 2357 (1997). In *Foreman*, Dallas County argued that its change in voting practice was not subject to § 5 because it was acting pursuant to a state statute which already had been precleared. This Court held that, in determining whether § 5 applies, "[t]he question is simply whether the County, by its actions, *whether taken pursuant to a statute or not*, 'enacted or [sought] to administer any . . . standard, practice, or procedure with respect to voting different from' the one in place on November 1, 1972." *Id.* at 2358 (citing 42 U.S.C. § 1973c) (emphasis added).

Although *Foreman*, like *Perkins*, involved an entire state which was the covered jurisdiction, this Court's analysis is controlling as to the crucial question here—whether a local jurisdiction "seeks to administer" a voting practice when its actions are taken pursuant to a state statute. *Foreman* answers this question in the affirmative and thereby fatally undermines the State's attempt to circumvent § 5. A county is "seeking to administer" a voting practice even when simply implementing a state statute. Thus, Monterey County's adoption of a county-wide election system is subject to preclearance whether now conducted pursuant to county ordinance or state law.

The lower court ignored this precedent and instead, relying on *Young v. Fordice*, 117 S.Ct. 1228 (1997), held that a voting change is exempt from § 5 unless it involves "some exercise of policy choice and discretion by the covered jurisdiction." J.S. App. 9, Order at 7. But *Young*'s analysis, arising in the context of whether a state could maintain a dual registration system, cannot be read so broadly. *Young* involved federal legislation —the National Voter Registration Act—that directly regulated states' voting practices, an area in which Congress' constitutional power to mandate such voting changes by the state is unquestioned. *See Smiley v. Holm*, 285 U.S. 355, 366 (1932); *Voting Rights Coalition v. Wilson*, 60 F.3d 1411 (9th Cir. 1995), *cert. denied*, 516 U.S. 1093 (1996). *See also State of South Carolina v. Katzenbach*, 383 U.S. 326, 324-327 (1966). In enacting § 5, Congress was concerned about the potential discriminatory effects of voting changes by "a State or political subdivision," not changes mandated by Congress itself. The distinct factual context in *Young*, therefore, is inapplicable to the facts presented here. The lower court's reliance on *Young* to create a gaping hole in § 5 coverage—exempting voting changes by covered counties so long as those changes are subsequently incorporated into state legislation—is wholly inconsistent with this Court's teachings as reaffirmed last term in *Foreman*, decided after *Young*.

The District Court thus erred by focusing on the wrong question. The critical question is not the legislative source of the voting change but simply whether a § 5-covered jurisdiction is implementing a voting change without first obtaining preclearance. Earlier decisions of this Court support this analysis.

United Jewish Organizations v. Carey, 430 U.S. 144 (1977), for example, involved a state reapportionment statute that affected voting changes in the three counties in the State of New York which were covered by § 5. In beginning its § 5 analysis, the Court stated, "Given this [§ 5] coverage of the counties involved ...." *Id.* at 157. Similarly, this Court in *Shaw v. Hunt*, 517 U.S. 899, ___, 116 S.Ct. 1894, 1903-1904 (1996), did not question the propriety of the Attorney General's § 5 review of North Carolina's redistricting plan as it affected the covered counties in that state. Although the jurisdictional issue was not addressed directly, "a review of the sources of the Court's jurisdiction is a threshold inquiry appropriate to the disposition of every case that comes before us." *Brown Shoe Co. v. United States*, 370 U.S. 294, 305-306 (1962).

The State discounts these decisions by asserting that the states "voluntarily" submitted their redistricting plans to the Attorney General. The focus on whether the submission is voluntary is misplaced for one important reason. The Attorney General and federal courts do not have any jurisdiction to review voting changes which are not subject to the § 5 preclearance provisions. *See Brown Shoe*, *supra*; *see also* 28 C.F.R. § 51.35 "Disposition of inappropriate submissions" ("The Attorney General will make no response on the merits with respect to an inappropriate submission... [which includes] submissions by jurisdictions not subject to the preclearance requirement ....").

This Court has consistently employed a territorial definition of § 5's coverage which focuses upon the location where the voting change is implemented, not the legislative source of the change. In *U.S. v. Board of Commissioners of Sheffield*,

Alabama, 435 U.S. 110, 113 (1978), this Court employed unmistakably plain language in stating that § 5 requires covered jurisdictions to "obtain prior federal approval before changing any voting practice or procedure ...." The *Sheffield* Court held that § 5 "applies to *all entities having power* over any aspect of the electoral process *within designated jurisdictions* ....." *Id.* at 118 (emphasis added). This holding exposes the fatal flaw in the lower court's analysis—the legislative source of the change in voting practice is irrelevant. Whether the county-wide system is the product of unprecleared county ordinances or superseding state statutes, the critical factor is that all entities that "enact or seek to administer" voting practice changes within a covered jurisdiction must ensure that those changes are precleared. Thus, even if the lower court was correct in concluding that superseding changes in state law converted the County's election scheme into a state plan, that conclusion in no way affects the unequivocal § 5 mandate of preclearance for "any" voting change in the covered jurisdiction.[7]

2. Plain Reading of the Statute Requires the § 5 Preclearance of State Statutes Which Affect Covered Jurisdictions

The plain language of § 5 must be reviewed to determine whether Monterey County may implement unprecleared voting changes pursuant to an unprecleared state statute. *Connecticut Nat. Bank v. Germain*, 503 U.S. 249, 253-54 (1992). And the plain language reveals why this Court's prior rulings have not

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[7] The legislative source of the voting change may be relevant to discriminatory purpose in the context of a § 5 retrogression analysis, *Reno v. Bossier Parish School Board*, 117 S.Ct. 1491, 1503 (1997) but that question is not before this Court. *See Lopez*, 117 S.Ct. at 348-349 (in action alleging failure to preclear, court lacks authority to consider discriminatory purpose).

questioned the requirement of preclearance of state statutes that affect covered jurisdictions within the legislating state.

A § 5-covered jurisdiction, such as Monterey County, which "enacts or seek[s] to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1968" must first secure approval from either the United States Attorney General or the United States District Court for the District of Columbia before such a voting change can be implemented. 42 U.S.C. § 1973c.

The District Court reasoned that the "plain language of the clause does not apply to an uncovered state which 'enact(s) or seek(s) to administer' a voting plan in a subordinate covered county." J.S. App. 5, Order at 4. The District Court's focus on the legislative source of the voting change renders meaningless any distinction between "enacts" and "seeks to administer." Yet this is contrary to the ordinary meaning of these terms, *see Asgrow Seed Co. v. Winterboer*, 513 U.S. 179, ___, 115 S.Ct. 788, 793 (1995) ("When terms used in a statute are undefined, we give them their ordinary meaning."), and is contrary to this Court's "reluctance to interpret a statutory provision so as to render superfluous other provisions in the same enactment." *Pennsylvania Dept. of Public Welfare v. Davenport*, 495 U.S. 552, 562 (1990) (*citing Mackey v. Lanier Collection Agency & Service, Inc.*, 486 U.S. 825, 837 (1988)). "Enact" is defined as "to make into law," whereas "administer" means "to manage or direct." Webster's New World Dictionary (3rd College ed. 1988). Thus, voting changes, as set forth in § 5, are not limited to those changes which are initiated by the covered jurisdiction but also include those that are managed or directed by it.[8]

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[8] A contrary interpretation would invite circumvention of § 5 by encouraging covered political subdivisions to forego the enactment and adoption of any voting changes and, instead, attempting to have the state adopt all changes affecting voting.

This distinction between "enact" and "administer" is also supported by California law which provides that, when elections are to be conducted at the local level, the local jurisdiction shall "administer" the election. In California Government Code §74784, for example, the state "enacted" a statute that directs a county official to "administer that election." Identical language is employed in numerous other state statutes. *See, e.g.,* Cal. Gov. Code §§ 26625, 26666, 26668, 72110, 72114, 73665.6(a), and 74820.1(b).

If Congress had wished to limit the scope of § 5 to changes initiated by the covered jurisdiction, it would not have used the term "administer" in addition to "enacts." By employing the language it did, Congress made clear that § 5 encompasses voting changes administered by the covered jurisdiction, not simply those it enacts.

The District Court further reasoned that "'seeks to administer'... must involve some exercise of policy choice and discretion by the covered jurisdiction" and that h e "[t]he County, as a subordinate jurisdiction of the State, lacks the discretion to choose a voting plan that does not involve a county-wide district." J.S. App. 9, Order at 7. Neither the plain language of § 5 nor this Court's construction of it even hint at the notion that "seeks to administer" only applies to a local jurisdiction when it is exercising discretion in its administration or implementation of an unprecleared state statute.

Indeed, in defining the reach of § 5, Congress recognized that mandatory state legislation, even emanating from an uncovered state, could have a discriminatory effect on the political participation of minority voters in a particular County. Thus, Monterey County became subject to the § 5 preclearance

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Such an interpretation would undermine the very purpose of § 5.

requirements pursuant to a coverage formula that relied upon the presence of a state-wide literacy test mandated by the California Constitution, even though the state of California itself was not covered. Cal. Const. Art. II, sec.1, (repealed 1972); 42 U.S.C. §1973 b(b); 28 CFR Part 51 (Appendix), 35 Fed. Reg. 12354 (1970); 36 Fed. Reg. 5809 (1971). Congress deemed irrelevant the fact that the state was the source of the literacy test which triggered the County's coverage, and that Monterey County had no choice but to enforce the state law. It would be incongruous to interpret § 5 coverage in a manner that would exclude from scrutiny all mandatory state laws, when it was mandatory state law that prompted Congress to subject Monterey County to § 5 scrutiny in the first place.

But even assuming *arguendo* that the District Court is correct in construing "seeks to administer" as requiring some exercise of discretion by the covered jurisdiction beyond what is involved in the implementation of an election scheme, Monterey County clearly made such a policy choice. State law did not require the County to adopt the changes in voting practice at issue herein. Indeed, during oral argument before this Court, the State conceded that Monterey County was free to adopt the consolidation ordinances and that these consolidations were not mandated by State law.[9]

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[9] Question: ... Was the—Monterey County free to adopt the plans that it did—at the time that it took the actions that it did?

Mr. Stone: Yes, It's various consolidation ordinances—

Question: It wasn't mandated by State law?

Mr. Stone: No. State law permitted the counties to adopt—

Question: But it didn't require it?

Mr. Stone: No, although there is some confusion on the record in that respect. Official Transcript of Proceedings Before the Supreme Court of the United States, *Lopez v. Monterey County*, October 8, 1996 at 35:18-36:5.

Most significantly, the 1979 statute was preceded by a County ordinance,[10] obviously reflecting the County's policy choice, which consolidated the same judicial districts specified in the state statute. Thus, the lower court cannot shield this voting change from § 5 scrutiny based upon the requirement "that it must involve some exercise of policy choice and discretion" for the simple reason that this unprecleared scheme, whether currently the product of a state statute or County ordinances, *does* reflect the policy choices of Monterey County. *Lopez*, 117 S.Ct. at 348 ("at-large county-wide system undoubtedly 'reflect[ed] the policy choices' of the County"). [11]

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[10] Prior to the enactment of the state statute, the Monterey County Board of Supervisors adopted on June 5, 1979, Monterey County Ordinance No. 2524, which consolidated the then three municipal court districts into one district named the Monterey County Municipal Court District. J.S. App. 94, First Amended Complaint at ¶ 40.

[11] The District Court's construction of § 5 is also flawed by failing to accord plain meaning to the term "*any* voting qualification." "Any" must be understood in the plural sense as all encompassing. 3A C.J.S. Any at 903 ("In this, its ordinary sense, it is a word which is broad and general, and comprehensive, and is broadly inclusive, and all embracing.")(footnotes omitted). Thus, "any" voting changes are not limited to those changes which are initiated by a covered jurisdiction but instead, must include all voting changes irrespective of their legislative origin. This interpretation mirrors the § 5 regulations. *See* 28 C.F.R. § 51.2 (definition of "Change affecting voting" refers to any voting change) and 28 C.F.R. § 51.12 (Section 5 applies to any voting changes).

3. The Legislative History of the 1982 Amendments to the Voting Rights Act Supports the Submission of State Statutes Which Affect Covered Political Subdivisions

The legislative history of the 1982 amendments to the Voting Rights Act provides further support for requiring the submission of California's statutes which affect § 5-covered counties.[12] During the legislative hearings before the Senate Subcommittee on the Constitution considering the 1982 amendments, the following colloquy occurred between Senator Orrin Hatch and Steve Suitts, then Executive Director of the Southern Regional Council:

> Senator Hatch. Thank you so much, Mr. Suitts.
> You complain about several enactments passed by the North Carolina Legislature which were not submitted under section 5. Is there any decision of the Supreme Court which holds that the legislature of a State which is only partially covered must submit its enactments to the Justice Department?
>
> Mr. Suitts. I do not know that there is a case precisely on that point, although I do not know that there has been any serious argument that that is not a requirement. It is pretty obvious that all those items [state

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[12] Because the State's restrictive interpretation of the § 5 preclearance provisions is contrary to the plain language of the statute, this Court's inquiry should end there without need to resort to a statute's legislative history. *Connecticut Nat. Bank v. Germain*, 503 U.S. at 253-54. In any event, resort to legislative history supports Appellants' plain language reading of the statute.

> statutes] which we identified do affect the 40 counties. There is a holding in the Federal court in North Carolina that a statewide law which affects one of the 40 counties must be submitted.

Hearings Before the Subcommittee on the Constitution of the Committee on the Judiciary, United States Senate on S. 53, S. 1761, S. 1975, S. 1992, and H.R. 3112 (Voting Rights Act), 97th Congress, 2nd Sess., Vol. 1 (1983) at p. 599. In response to this colloquy, the Senate Report,[13] accompanying the passage of the 1982 amendments specifically stated: "While North Carolina, as a State, is not subject to section 5, the legislation in question affected North Carolina counties which are covered and, therefore, it should have been precleared." Senate Report No. 97-417, 97th Congress 2d Sess. (May 25, 1982) at 12, n. 32 [hereinafter cited as Senate Report]. This clear directive was ratified by Congress when the 1982 amendments to the Voting Rights Act were enacted. *See United States v. Bd. of Comm'rs of Sheffield*, 435 U.S. at 134 - 135 (1978) (Court concluded that Congress ratified § 5 statutory interpretation as indicated by administrative practices of the Attorney General and legislative history showing that Congress agreed with that interpretation).

In view of this legislative history and the subsequent congressional ratification, there can be no serious dispute that the Voting Rights Act requires preclearance of state statutes which affect voting changes in § 5-covered counties.

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[13] Legislative committee reports are the best source for determining legislative intent. *Thornburg v. Gingles*, 478 U.S. 30, 43, n. 7 (1986)("We have repeatedly recognized that the authoritative source for legislative intent lies in the Committee Reports on the bill.")(relying upon Senate Report 97-417 for determining legislative intent of § 2 of the Voting Rights Act).

4. The District Court's Holding Conflicts with the Attorney General's Longstanding Construction of § 5 and the Attorney General's Consistent Practice of Requiring § 5 Submissions of State Enactments Affecting Covered Jurisdictions

Pursuant to applicable regulations, the United States Attorney General evaluates statutes from states not subject to the § 5 preclearance provisions, when those statutes affect voting changes in political jurisdictions within the state that are subject to § 5. *See* 28 C.F.R. § 51.23 ("When one or more counties or other political subunits within a State will be affected, the State may make a submission on their behalf."). For example, the Attorney General has evaluated North Carolina's legislative redistricting plan as it affected § 5-covered counties. *See* Senate Report at 11 (Letter of Objection of Asst. Attorney General, December 7, 1981).[14] Moreover, in the recent congressional redistricting in North Carolina, the plan was submitted to and evaluated by the Attorney General prior

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[14] Although the State of North Carolina is not subject to § 5 preclearance, *see* 28 C.F.R. Part 51 (Appendix), the Attorney General has evaluated other North Carolina state statutes affecting § 5-covered counties within the state. Extension of the Voting Rights Act of 1965, Hearings Before the Subcommittee on Constitutional Rights of the Committee on the Judiciary, United States Senate, 94th Congr., 1st Sess. Testimony of Hon. J. Stanley Pottinger, Assistant Attorney General, Civil Rights Division, Department of Justice, at 535, Exhibit 5 at 600 (April 8, 9, 10, 22, 29, 30, May 1, 1975), Letters of Objection, dated July 30, 1971 & September 27, 1971. There was also a letter of objection against the congressional, assembly, and senate redistrictings for the State of New York, although the state itself is not a § 5-covered jurisdiction. Letter of Objection, dated April 1, 1974. *Id.*, at p. 599 & 667.

to the constitutional challenge filed by Anglo voters. *Shaw v. Hunt*, 116 S.Ct. at 1899. *See also Johnson v. DeGrandy*, 512 U.S. 997, 1001 n. 2 (1994) (Florida congressional redistricting plan submitted for § 5 preclearance because five counties are subject to § 5). Given this consistent administrative practice, the District Court failed to accord proper deference to the Attorney General's interpretation of § 5 and the Attorney General's § 5 practices which repeatedly have required the submission of state statutes which affect voting changes in covered counties even if the state is not subject to § 5.[15] *See, e.g.*, 28 C.F.R. § 51.12 ("Any change affecting voting [is subject to preclearance requirement even if it] is designed to remove the elements that caused objection by the Attorney General to a prior submitted change ....").

Moreover, if there is any ambiguity in applying the § 5 preclearance provisions, such ambiguity must be resolved against the submitting jurisdiction. *N.A.A.C.P. v. Hampton County Election Com'n*, 470 U.S. 166, 178-179 (1985)("Any doubt that these changes are covered by § 5 is resolved by the construction placed upon the Act by the Attorney General, which is entitled to considerable deference." (footnote omitted)). In the present case, if there is any ambiguity to the

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[15] Given the central role of the Attorney General in the § 5 preclearance process, such an administrative interpretation is entitled to deference. *U. S. v. Bd. of Comm'rs of Sheffield*, 435 U.S. at 131 ("In recognition of the Attorney General's key role in the formulation of the Act, this Court in the past has given great deference to his interpretations of it."); *Blanding v. Dubose*, 454 U.S. 393, 401 (1982) ("We have frequently stated that courts should grant deference to the interpretation given statutes and regulations by the officials charged with their administration.") (agreeing with Attorney General's interpretation that receipt of certain documents constitutes a request for reconsideration of a previously issued § 5 objection letter, rather than a new submission of a voting change).

Attorney General's interpretation of § 5 to require the review of state statutes under the circumstances of this case, such ambiguity must be resolved against Monterey County. [16]

B. Even If § 5 Does Not Apply to the State Statute's Implementation in Monterey County, the District Court Erred in Concluding that Antecedent County Ordinances Are Exempt From Preclearance Requirements

According to the lower court, the county-wide district "was created by the 1979 amendment to [California Government Code] section 73560 and County Ordinance 2930." J.S. App. 8, Order at 6. And, the lower court concluded, "the 1979 amendment did not need preclearance, and Ordinance 2930 was precleared." *Id.* at 6, n.4. But this Court already has found that, while the preclearance of the 1983 state statute "may well have served to preclear the 1983 County ordinance [2930]," the other antecedent consolidation ordinances are subject to § 5 requirements but "do not appear to have received

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[16] This deference to the United States Attorney General's administrative interpretation of the § 5 preclearance provisions is not without limits. *See Presley v. Etowah County Com'n*, 502 U.S. 491, 508-09 (1992) (Court did not defer to an administrative interpretation provided by the Attorney General, because Congress specifically stated its intent that § 5 reached only those changes affecting voting); *Miller v. Johnson*, 515 U.S. 900, ___ 115 S.Ct. 2475, 2491-2492 (1995)(Although the Court has deferred to the Justice Department's interpretation of the Voting Rights Act in statutory cases, it is inappropriate to do so when the Court is engaged in constitutional scrutiny.). In the present litigation, the Attorney General's interpretation of § 5, requiring the review of state statutes affecting § 5-covered counties, is consistent with the express language of § 5 as well as its legislative history. Thus, this Court should defer to this administrative interpretation.

federal preclearance approval." *Lopez*, 117 S.Ct. at 345. Thus, even if the lower court is correct that the 1979 state statute "did not need preclearance," the county-wide system itself cannot be implemented because the antecedent County ordinances have never been precleared.

These antecedent County ordinances consolidated judicial districts and modified the boundaries of these districts to create the Southern and Central Judicial Districts.[17] The two judicial districts were subsequently incorporated in Monterey County Ordinance No. 2930 and consolidated with the existing municipal court district to create county-wide judicial elections. These antecedent County ordinances must secure § 5 approval. *Id.* at 345.

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[17] For example, the boundaries of the Central Judicial District were established as a result of a series of county ordinances dating from 1972. On November 1, 1968, the date of § 5 coverage, there were two justice court districts in the central part of the County - the Gonzales Judicial District and the Soledad Judicial District. J.S. App. 89, First Amended Complaint at ¶ 13. The County adopted several ordinances which modified the boundaries of these two justice court districts (Monterey County Ordinance No. 1852, adopted on February 1, 1972), *id.*, at ¶¶ 18, 19, consolidated the two districts into the Soledad-Gonzales Judicial District (Monterey County Ordinance No. 1917, adopted on October 3, 1972), *id.* at ¶¶ 20, 21, adjusted the boundaries of the consolidated district (Monterey County Ordinance No. 2139, adopted on January 13, 1976), *id.* at ¶¶ 26, 27, renamed the district to the Central Judicial District (Monterey County Ordinance No. 2212, adopted on September 7, 1976), *id.* at ¶ 35, and adjusted the boundaries of the Central Judicial District, *id.* All of these county ordinances preceded Monterey County Ordinance No. 2930. This Court noted that none of these antecedent county ordinances has received the required § 5 preclearance. *Lopez*, 117 S.Ct. at 345, 348, 349.

Yet the lower court here relied upon "superseding" changes in state law that purportedly "converted the County's judicial election scheme into a state plan thus eliminating the need for preclearance." J.S. App. 6, Order at 4. In a substantially similar context, this Court held that there is a "presumption that the Attorney General will review only the current changes in election practices effected by the submitted legislation, not prior unprecleared changes reenacted in the amended legislation." *Clark v. Roemer,* 500 U.S. 646, 657 (1991). A covered jurisdiction's submission of a "change from one number of judges to another in a particular judicial district does not, by itself, constitute a submission to the Attorney General of the prior voting changes incorporated in the newly amended statute." *Id.* at 658. If, as this Court held, subsequently enacted legislation that is submitted for preclearance cannot serve to preclear antecedent incorporated changes, then surely state legislation that is *not* submitted, even assuming *arguendo* that it is exempt from § 5, cannot serve to preclear the antecedent County ordinances here. For example, the 1979 statute refers to the North Monterey County Judicial District, J.S. App. 32, which is also mentioned in the 1977 statute. J.S. App. 30. However, neither of the two statutes defined the judicial district. The County through a series of ordinances defined the boundaries of the Castroville and Pajaro Justice Districts, consolidated those districts into one district, and renamed the district the North Monterey County Judicial District. *See, e.g.*, Monterey County Ordinance No. 2195, adopted on August 10, 1976 (changing boundaries of the consolidated district and renaming district). J.S. App. 65. Without incorporating these earlier changes by the County, the later-enacted state statutes would be meaningless.

The lower court's reliance upon "superseding" changes in state law also runs afoul of the principle that the "duty to obtain federal approval of new voting standards, practices, or procedures is a continuing one. It arises anew each time the defendant enacts or seeks to administer an uncleared voting regulation." *Dotson v. City of Indianola*, 514 F. Supp. 397, 401

(N.D. Miss. 1981). This construction is consistent with the plain language of § 5 which provides that "[w]henever" a covered jurisdiction "enact[s] or seek[s] to administer" a change in voting practice, preclearance must be obtained. 42 U.S.C. § 1973c.

There is no temporal limitation on the preclearance requirement nor any exception when subsequent legislation amends or "supersedes" the original voting practice change. "[A]ny" change in voting practice in the covered jurisdiction is subject to § 5 and remains so until precleared.

Nonetheless, the State seeks to immunize voting changes in the County from preclearance requirements by actions taken subsequent to the § 5 violation. But the county-wide system was indisputably created by County ordinances, almost all of which have never been precleared. That violation is a "continuing one" and cannot be cured by "superseding" legislation. *Dotson,* 514 F.Supp. at 401. To hold otherwise would sanction a County's enactment of unlawful changes so long as it was later able to obtain superseding state legislation. Section 5 should not be subject to such abuse, and a covered jurisdiction's citizens should not be so easily deprived of a remedy when confronted by unlawfully adopted electoral schemes.

Conclusion

As this Court recently noted in *Morse v. Republican Party of Virginia*, 517 U.S. 186, ___, 116 S.Ct. 1186, 1201 (1996), "[t]he purpose of preclearance is to prevent all attempts to implement discriminatory voting practices that change the status quo." Here, it is undisputed that Monterey County repeatedly changed the status quo without subjecting such changes to § 5 review. *Lopez*, 117 S.Ct. at 345. By exempting those changes from preclearance because a state statute incorporating those changes was subsequently enacted, the lower court employs a

fiction that the changes never existed. Such a distorted reading of § 5 cannot be countenanced.

This Court should instruct the District Court to issue a § 5 injunction requiring that any election system based in any way upon any of the unprecleared state statutes or County ordinances not be implemented unless and until § 5 preclearance has been obtained.

Accordingly, this Court should summarily reverse the judgment of the lower court. Alternatively, this Court should note probable jurisdiction.

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Respectfully submitted,

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